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Nos. 89-700 & 89-453

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY,

Petitioner,

—v.—

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

METRO BROADCASTING, INC.,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, AND THE NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER IN NO. 89-700 AND IN SUPPORT OF RESPONDENTS IN NO. 89-453

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many of the affirmative action cases decided by the Court during the past fifteen years. Because these cases involve an attempt to promote diversity in the broadcast industry, they have special significance for the ACLU, which has pursued a pluralistic vision of the marketplace of ideas since its founding seventy years ago.

The New York City Commission on Human Rights was established in 1955 to combat discrimination in the City of New York. The Commission enforces New York City's human rights law and seeks to combat the effects of discrimination in the nation's largest city. The Commission has consistently supported narrowly tailored plans designed to remedy the effects of past discrimination.

NOW Legal Defense and Education Fund (NOW LDEF) was established in 1970 by leaders of the National Organization for Women as a separate nonprofit 501(c)(3) organization dedicated to working for equality of opportunity for women and men. NOW LDEF has stressed from the time of its foundation the importance of women's access to and participation in the media. Since 1970, NOW LDEF has petitioned the Federal Communications Commission on many occasions to enhance equal employment opportunities for women

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

and to increase diversity in programming by expanding coverage of issues of concern to women and by diversifying ownership and control of organs of the media.

SUMMARY OF ARGUMENT

The complexity of affirmative action, as a moral and legal issue, is fairly reflected in this Court's fractured decisions addressing the subject. Nevertheless, certain guiding principles have emerged from the nation's struggle to overcome a legacy of discrimination whose consequences are, unfortunately but undeniably, still felt today. First, the Court has upheld narrowly tailored "remedial" plans that undo the effects of past injustice. Second, the Court has recognized that certain key institutions play a critical role in assuring the proper functioning of a democratic society. When those institutions become unrepresentative, for whatever reason, the Court has recognized the "structural" value of affirmative action in correcting the imbalance.

The FCC policies now before the Court can be justified under either model. The congressional findings of past discrimination are both entitled to respect and adequate to support an affirmative action plan. Even absent such findings, however, the desire to promote a diversity of voices within the broadcast industry, given its absolutely critical role as an information source for the American public, can and should be accepted as a compelling state interest.

Largely for that reason, we believe that the minority preference at issue in *Metro Broadcasting* and the distress sale policy at issue in *Astroline Communications* can each be upheld even under strict judicial scrutiny. We also believe, however, that the strict scrutiny standard announced last year in *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), is not the appropriate standard for reviewing affirmative action efforts authorized or

mandated by Congress. First, the text of the Constitution specifically charges Congress with responsibility for implementing the promise of equality contained in the Fourteenth Amendment. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980). Second, the size and diversity of the national government minimizes the chances that it will be "captured" by a transient majority interested in unjust self-enrichment. Third, unlike *Croson*, the affirmative action plans now at issue were not adopted by a legislative majority that also qualified as a benefitted group. Under these circumstances, the justification for strict scrutiny articulated in *Carolene Products* may not apply with equal force.

Additionally, we believe that both challenged policies represent narrowly tailored responses by the FCC to the dramatic and documented underrepresentation of women and minorities in the broadcast industry. The minority preference policy is not an inflexible quota that requires the selection of minority applicants for a fixed number of broadcast licenses. Rather, it only applies if the competing applicants are deemed substantially equivalent when judged by other neutral criteria. Similarly, the distress sale policy does not deprive nonminorities of any vested right or settled expectation. Its impact is therefore similar to the affirmative action plans for hiring and promotion that this Court has frequently upheld.

In sum, *amici* respectfully submit that the decision in *Metro Broadcasting* should be affirmed, and the decision in *Astroline Communications* should be reversed.

ARGUMENT

THE FCC AFFIRMATIVE ACTION POLICIES AT ISSUE SHOULD BE UPHELD

A. Narrowly Tailored Affirmative Action Plans Designed To Repair A Damaged Institution Or To Redress The Consequences Of Identifiable Past Discrimination Are Lawful

In the years since the issue was first explicitly considered by this Court in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the legality of so-called "affirmative action" or "benign" compensatory programs that use race or gender as allocative criteria in an effort to benefit women or members of racial minorities has been discussed on at least twenty occasions.[2]

[2] *Morton v. Mancari*, 417 U.S. 535 (1974)(upholding employment preferences for American Indians in the Bureau of Indian Affairs); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)(invalidating Social Security benefits confined to widows because purpose was not remedial); *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) (upholding race-conscious remedies in Title VII cases); *Craig v. Boren*, 429 U.S. 190 (1976)(invalidating gender discrimination in access to 3.2 beer because not based on remedial purpose); *Califano v. Goldfarb*, 430 U.S. 199 (1977)(invalidating presumption of widow dependency because not based on remedial purpose); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)(upholding use of racial criteria in redistricting to enhance likelihood of success of minority candidates); *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (protecting rights under *bona fide* seniority systems even when it perpetuates the effects of past racial discrimination); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978)(upholding use of minority race as positive admissions criteria, but invalidating fixed racial quota of 16% minority admissions to medical school); *United Steelworkers v. Weber*, 443 U.S. 193 (1979)(upholding under Title VII a voluntarily established race-conscious promotion system designed to remedy the effects of past industry-wide discrimination); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(upholding congressional plan setting aside 10% of government contracts for minority owned enterprises in an effort to (continued...)

Not surprisingly, given the difficult legal and moral issues raised by "benign" discrimination in favor of the targets of past injustice,[3] the Court has experienced diffi-

[2] (...continued)
remedy the consequences of past industry-wide discrimination); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)(invalidating unauthorized modification of Title VII consent decree to provide for race conscious layoffs in derogation of *bona fide* seniority system); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (invalidating contract by public employer providing for race conscious layoffs in derogation of *bona fide* seniority system); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986)(upholding consent decree settling Title VII case extending race-conscious hiring and promotion benefits to nonvictims of past discrimination); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(upholding power of Title VII court to order race conscious hiring and promotion to benefit nonvictims of proven racial discrimination); *United States v. Paradise*, 480 U.S. 149 (1987)(upholding judicially imposed racial quota for promotions in order to remedy persistent violations of Title VII); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(upholding under Title VII voluntary plan adopted by public employer that used female gender as a "plus" factor in determining promotions to "traditionally segregated" job categories); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(invalidating Richmond plan setting aside 30% of government contracts for minority owned enterprises in absence of a showing of remedial need). *See also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

In addition, *Kahn v. Shevin*, 461 U.S. 351 (1974), and *Schlesinger v. Ballard*, 419 U.S. 498 (1975), are often cited as examples of affirmative action. *Amici* believes, however, that characterization is inapt. *Schlesinger* involved the use of differential rules to reflect actual differences in career ladders faced by men and women in the armed services. It was in no sense a remedial case. *Kahn* involved a purported remedial statute that was, in reality, driven by a stereotypical view of the role of women that was rejected by this Court in *Weinberger*, *supra*, and *Craig v. Boren*, *supra*. The majority's unquestioning acceptance of the existence of a remedial motive in *Kahn* appears at variance with its treatment of sex based distinctions in later cases.

[3] *Compare* A. Bickel, *The Morality of Consent* 133 (1975)("a racial (continued...)

culty in articulating a set of general principles governing affirmative action.[4] However, despite the often fragmented nature of the Court's decisions,[5] *amici* believes that the Court's jurisprudence yields valuable general principles that suggest a constructive path through the legal and moral thicket posed by affirmative action.[6]

In a perfect world, race or gender would almost never be a permissible criterion for the allocation of a valuable benefit.[7] It is, after all, an article of our collective faith that a free market in talent should be the

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[3] (...continued)
quota derogates the human dignity and individuality of all to whom it is applied") with R. Dworkin, *Taking Rights Seriously* 227-29 (1978) (affirmative action is consistent with an individual's right to equal respect and concern).

[4] *See* Choper, "Continued Uncertainty of Remedial Race Classifications: Identifying Pieces of the Puzzle," 72 Iowa L.Rev. (1987).

[5] The Court has considered the constitutionality of affirmative action plans in seven cases. In five of those cases, the Court was unable to issue a majority opinion. *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). Five Justices joined Justice O'Connor's decision for the Court in *Croson* and Justice Douglas' opinion for the Court in *Kahn v. Shevin*.

[6] *Amici* has not attempted to distinguish Title VII cases from constitutional cases in assessing the legality of affirmative action plans for the purposes of this case. It is certainly possible to articulate differing standards under the Equal Protection Clause and Title VII concerning the legality of affirmative action, but this Court has appeared to view the governing standards as indistinguishable.

[7] *E.g. Batson v. Kentucky*, 476 U.S. 79 (1986); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). For an example of a rare setting in which race was deemed an appropriate employment criterion, *see Morton v. Mancari*, 417 U.S. 535 (1974).

determinant of an individual's fate. But we do not live in a perfect world. The distribution of wealth and power in our society has been skewed by two undeniable historical facts that have impeded the operation of a true free market in talent. First, racial minorities in the United States have been the target of massive -- and, until relatively recently -- governmentally sanctioned racial discrimination that has severely limited their opportunity to compete fairly for the rewards of a free market in talent.[8] Second, women have been denied the freedom to compete equally with men because a governmentally endorsed ideology confined them to stereotypical roles as wives and mothers, denying many women the opportunity to develop their full human potential.[9]

In the years since the Second World War, our society has succeeded in forging a jurisprudence of fairness that forbids the most explicit forms of race and gender discrimination. But the welcome enunciation of prospective norms of racial and sexual justice has not eliminated the consequences of centuries of discrimination. Women and racial minorities remain radically underrepresented in critical areas of American life. Over the long run, vigorous enforcement of our existing anti-discrimination norms, coupled with adequate educational opportunity, offer our best hope for a color-blind and a gender-blind

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[8] *See e.g., Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1882); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Baldwin v. Frank*, 120 U.S. 687 (1887); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Giles v. Harris*, 189 U.S. 475 (1903); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Breedlove v. Suttles*, 302 U.S. 277 (1937); *Korematsu v. United States*, 323 U.S. 214 (1944).

[9] *See e.g., Bradwell v. Illinois*, 83 U.S. 130, 141 (1872)(Bradley J. concurring)("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator"); *Minor v. Happersett*, 88 U.S. 162 (1875); *Goesart v. Cleary*, 335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961).

future. In at least two settings, however, the Court's affirmative action jurisprudence has made clear the legitimacy of hastening the corrective process by favoring members of the underrepresented groups.

First, this Court has upheld the use of race or gender based remedial plans to undo the consequences of identifiable past discrimination.[10] As this Court has recognized, absent race or gender based "remedial" plans, victims would remain uncompensated; wrongdoers would stand uncorrected; and innocent third persons would unintentionally reap the unearned benefits of discrimination as a form of unjust enrichment.[11] Thus, while areas of uncertainty continue to exist as to the nature of the past discrimination that may trigger a remedial plan;[12] the quantum of evidence needed to document the discrimination;[13] the identity of the institution that must certify or acknowledge the discrimination;[14] and the identity of the beneficiaries,[15] the Court's opinions provide significant guidance against which to measure the legality of a "remedial" affirmative action plan. Specifically, once Congress has determined that past discrimination has resulted in an ongoing failure to include women or racial minorities in a desirable economic setting, narrowly tailored "remedial" efforts to increase their future participation have been deemed lawful. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Morton v. Mancari*, 417 U.S. 535 (1974).

Second, where historic patterns of discrimination have resulted in the absence of women and racial minorities from significant American institutions whose proper functioning is impeded by the resulting imbalance, this Court has recognized a "structural" need to repair the damaged institution through the use of race or sex as an allocative criteria. For example, in *Morton v. Mancari*, 417 U.S. 535 (1974), a unanimous Court upheld the constitutionality of employment preferences for American Indians in the Bureau of Indian Affairs because the preferences were necessary to permit the Bureau to carry out its mission of enhancing Indian self-government. Similarly, in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), the Court upheld an explicit racial gerrymander under the Voting Rights Act designed to enhance the likelihood that racial minorities

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[10] *E.g. Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976); *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). *But see City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(invalidating Richmond plan setting aside 30% of government contracts for minority owned enterprises in absence of a showing of remedial need).

[11] *See* Neuborne, "Observations on Weber," 54 N.Y.U.L.Rev. 546, 548-49, n.9 (1979).

[12] *Compare Kahn v. Shevin*, 416 U.S. 312 (1974) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(broad societal discrimination may trigger voluntary efforts at remedial process) with *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(past discrimination must occur in particularized setting).

[13] *Compare Fullilove v. Klutznick*, 448 U.S. 448 (1980) with *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989).

[14] *See e.g., United Steelworkers v. Weber*, 443 U.S. 193 (1979)(judicial finding of past discrimination unnecessary, so long as reasonable apprehension of past discrimination present); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(legislative finding of past discrimination invalid in absence of relevant evidence).

[15] *See Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986)(authorizing consent decree benefits to nonvictims); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986)(authorizing court awarded benefits to nonvictims).

would be elected in New York City. In *United Jewish Organizations*, the Court was confronted with a breakdown in the democratic process that had reduced voter participation in areas of New York City to less than 50% of the eligible voting population, thus triggering the provisions of the Voting Rights Act. While the causes of the breakdown did not involve proven, or even suspected, unconstitutional behavior on the part of New York City officials,[16] both the Department of Justice and this Court recognized that the imperative of repairing central democratic institutions justified Congress' decision to provide for the use of race conscious district lines, despite the adverse impact on white voters. Likewise, Justice Powell's determinative opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), upheld the use of race conscious admissions criteria in institutions of higher education because the absence of women and minorities from educational institutions was adversely affecting the educational mission. As Justice Powell understood, not only does the very presence of women and minorities in an academic setting act to dispel negative stereotypes, but their presence and participation enriches the educational climate by introducing divergent perspectives and viewpoints. No professor who has taught classes that have evolved from all white male enclaves prior to *Bakke* into multi-racial, gender-blind colloquia would dispute the wisdom of Justice Powell's insight that affirmative action on behalf of women and racial minorities is justified, not merely to remedy the ongoing consequences of past discrimination, but to enrich the academic free market in ideas that is artificially impoverished by their absence.

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[16] In *UJO*, the provisions of the Voting Rights Act were triggered by the low voter turnout and the historic use of a literacy test in New York City. This Court had upheld the constitutionality of literacy tests in local elections. *See Lassiter v. Northampton Board of Elections*, 360 U.S. 45 (1959).

Thus, while "remedial" use of race or gender is designed to undo the continuing consequences of past identifiable discrimination, "structural" affirmative action involves the repair of an institution of importance to American society whose functioning is currently impaired by the historic exclusion of women and minorities. *See also Taylor v. Louisiana*, 419 U.S. 522 (1975)(jury integrity imperilled by laws encouraging nonparticipation by women); *Duren v. Missouri*, 439 U.S. 357 (1979).

Of course, this Court has recognized that the decision to use race or gender as an allocative criterion, whether driven by a "structural" desire to repair a damaged institution or by a "remedial" desire to right a past wrong, must be tempered by the impact on third persons whose interests will be affected by the use of such criteria. Thus, where an innocent third person is asked to surrender a settled status, the Court's decisions suggest that even a valid "structural" or "remedial" use of race or sex may be unduly disruptive of earned expectations.[17] Where, however, a third person is asked to forego a mere expectancy, the Court has held that the imperative of repairing a damaged institution or righting a past wrong will generally justify the use of otherwise irrelevant criteria.[18]

Finally, the inevitable disagreements that will arise over whether recourse to "remedial" or "structural" af-

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[17] *E.g. Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[18] *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). *Compare Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)(invalidating layoffs) with *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(upholding promotions and hiring).

firmative action is warranted in particular settings,[19] and the difficult moral calculus required to assess third person loss,[20] raise troubling questions of relative institutional competence. In resolving those questions, this Court has held that the absence of a perceived danger of majoritarian overreaching justifies a more deferential standard of judicial review when evaluating congressionally designed affirmative action plans, whether "structural" or "remedial."[21] *See* pp.18-19, *infra*.

B. The FCC Affirmative Action Plans At Issue Herein Are Valid Both As Congressionally Imposed "Structural" Attempts To Enhance The Diversity Of Viewpoint On The Broadcast Spectrum And As "Remedial" Attempts To Mitigate The Consequences Of Past Discrimination

Congress has directed the FCC to continue two policies designed to increase the number of broadcast frequencies that are owned or controlled by women or

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[19] In a "remedial" context, the issues include (1) whether a reasonable apprehension of past discrimination exists; (2) the identity of the institution that may acknowledge the past discrimination; and (3) the causal nexus between the past discrimination and the present imbalance. In a "structural" setting, the principal issue is whether the imbalance adversely affects the optimum functioning of a critical democratic institution.

[20] In order to engage in the balancing process, the precise loss to third persons must be identified and weighed against the importance of remedying a past wrong or repairing a current institution.

[21] *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(Congress dominated by white males elects to give preference to minorities; subjected to deferential scrutiny); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)(Congress dominated by white males seeks to improve minority representation; subjected to deferential scrutiny).

members of racial minorities.[22] One policy, at issue in the *Metro Broadcasting* case, grants applicants that are owned or controlled by women or by members of racial minorities a preference in comparative broadcast licensing proceedings.[23] As between substantially equivalent applicants, FCC policy resolves the issue in favor of expanding the number of broadcast voices that are owned or controlled by women or racial minorities. The second policy, at issue in the *Astroline* case, permits a current licensee who is in significant danger of losing a

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[22] The affirmative action policies at issue were initially adopted by the FCC pursuant to its broad mandate to serve the "public interest." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). The basis for the policies is set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); FCC Minority Ownership Task Force, *Minority Ownership in Broadcasting* (1978); *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

The judicial history of the policies may be traced through *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056 (D.C.Cir. 1975); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Steele v. FCC*, 770 F.2d 1192 (D.C.Cir. 1985), *vacated and remanded*, 806 F.2d 1126 (D.C.Cir. 1986); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C.Cir. 1989), *cert. granted*, ___ U.S. ___ (1990); *Shurberg Broadcasting of Hartford v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, ___ U.S. ___ (1990).

Congress' initial expression of support for affirmative action in the FCC context may be found in its approval of the use of racial or gender preferences in connection with the lottery method for allocating broadcast frequencies. *See* H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

[23] The use of minority ownership as a "plus" factor in comparative license proceedings was initially discussed in *WPIX, Inc.*, 68 F.C.C.2d 381 (1978). The granting of a "plus" factor to female ownership was initially discussed in *Gainsville Media, Inc.*, 70 F.C.C. 143 (Rev. Bd. 1978) and *Mid-Florida Television Corp.*, 69 F.C.C.2d 607 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).

broadcast license to transfer the license pursuant to a "distress sale" for not more than 75% of its value to an entity that is owned or controlled by a racial minority.[24]

When the FCC announced the possibility of abandoning its affirmative action policies in 1987, Congress explicitly responded by inserting a provision in the 1988 appropriations bill for the FCC forbidding the agency from altering its existing policies. A similar provision was inserted into the 1989 and 1990 FCC appropriations bills. Continuing Appropriations Act for the Fiscal Year 1988, Pub.L. No. 100-202, 101 Stat. 1329; Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub.L. No. 100-459, 102 Stat. 2216-17; Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub.L. No. 101-162, 103 Stat. 1020-21. Congress' thrice-repeated decision to mandate the continuation of the FCC's affirmative action policies constitutes a considered congressional policy choice entitled to respect by the coordinate branches.

(1) Both The Comparative Preference And Distress Sale Plans Are Valid "Structural" Attempts To Enhance Viewpoint Diversity On The Broadcast Spectrum

By mandating the continuation of the FCC's affirmative action policies, Congress sought both to redress past

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[24] Ordinarily, a licensee whose qualifications are in question may not sell its broadcast license until the FCC has resolved its doubts in a noncompetitive hearing. *Northland Television, Inc.*, 42 Rad.Reg.2d (P&F) 1107 (1978). The initial use of distress sales was an exception to the general policy of nontransferability in cases of bankruptcy or disability. In 1978, the FCC expanded the category of distress sales to include sales to purchasers owned or controlled by racial minorities. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 979, 983 (1978).

discrimination[25] and to repair a critical American institution imperilled by the virtual absence of voices controlled by women and racial minorities from the broadcast spectrum. Congress realized that the artificial absence of broadcast voices owned or controlled by women and racial minorities endangers the integrity of the free market in ideas.[26] *Cf. Taylor v. Louisiana*, 419 U.S. 522 (1975)(absence of women from jury venire threatens integrity of fact-finding process). As Justice Powell recognized in *Bakke* and as this Court recognized in *United Jewish Organizations*, the artificial absence of a

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[25] Given the clear "structural" justification for Congress' decision to adopt an affirmative action plan, it is not necessary to consider at length whether the plan should be also upheld as a "remedial" plan, and our brief does not do so.

It is worth noting, however, that Congress expressly found that the absence of women and racial minorities from the broadcast spectrum was a result of historic patterns of discrimination. *See* H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). Given the deferential standard of review that governs congressional decisions to recognize the consequences of past patterns of discrimination, *see Fullilove*, Congress' finding of past discrimination affecting the broadcast industry is sufficient to justify a narrowly tailored "remedial" affirmative action plan. *Id.*

It is also worth noting that the exclusion of women and minorities from the broadcast industry is due to more than generalized societal discrimination. As demonstrated in the *amicus* brief submitted by the Congressional Black Caucus, *et al.*, the FCC's past policies and practices contributed to this discriminatory pattern.

[26] This finding by Congress parallels the conclusion of the FCC, whose 1978 report on minority ownership noted:

> Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978).

significant segment of the populace from one of the core institutions of representative democracy threatens the integrity of the democratic process by eliminating a potential source of different perspectives. It is no coincidence, therefore, that the contexts in which this Court has recognized the imperative of "structural" affirmative action have involved the central institutions of representative democracy: the electoral process in *United Jewish Organizations*; the process of higher education in *Bakke*; the jury in *Taylor*; and the desire for Indian self government in *Morton v. Mancari*.

This case involves an application of the identical principles to the most significant vehicle for communication in a modern democratic society, the scarce societal resource of the broadcast spectrum. *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Acknowledging that the FCC's affirmative action policies promote viewpoint diversity does not mean that all members of a group think or believe the same thing. Obviously, a broad divergence of views will exist within every group. However, when the voice of an entire segment of the populace is absent from one of the core institutions of representative democracy, a significant danger is created that a divergent point of view will be overlooked.[27]

Indeed, for precisely that reason, Section 307(b) of the Communications Act, 47 U.S.C. §307(b), currently grants a dispositive preference to the first applicant to provide local broadcast service to an otherwise unrepresented locality. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C.Cir. 1985); *Radio Jonesboro, Inc.*, 96

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[27] As Congress observed in 1987: "Diversity of ownership results in diversity of programming." S.Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Five years earlier, Congress observed that the "nexus" between minority ownership and diversity has been "repeatedly recognized." H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

F.C.C.2d 1106, 1109 (Rev. Bd. 1984), *aff'd*, 100 F.C.C.2d 941 (1985)(local residence as "plus" factor). One need not assume that all residents of a particular locality will think or believe the same thing to recognize the danger of leaving a locality entirely unrepresented in the broadcast spectrum. The goal in both settings is the same: to allocate scarce broadcast frequencies so as to assure the expression of as many divergent viewpoints as possible and to assure that no discernible segment of American society is left voiceless in the broadcast spectrum.[28]

(2) Congress' Decision To Adopt An Affirmative Action Policy Is Subject To A Deferential Level Of Scrutiny

As with any "structural" affirmative action program, reasonable people may differ over whether the institution at issue is in need of repair and whether the precise plan unfairly "trammels" the interests of innocent third persons. In this case, Congress has made a considered judgment that the absence of female and minority controlled voices from the broadcast spectrum impairs the optimal functioning of an important American institution and has mandated two corrective programs in an effort to repair the institution. A threshold issue, therefore, is the level of judicial scrutiny to which Congress' judgment may properly be subjected.

In *Croson*, Justice O'Connor, writing for the Court, suggested that the use of "suspect" criteria such as race or sex in the allocation of local government benefits

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[28] This Court has endorsed the FCC's attempts at securing diversity by upholding bans on cross ownership of broadcast facilities and newspapers in the same geographical setting, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and by applying the antitrust laws to the communications industry. *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

should be subjected to the most searching level of judicial scrutiny -- a requirement that it advance a compelling state interest by the least drastic means. While *amici* believes that the policies at issue in these cases satisfy even the most rigorous level of judicial scrutiny, three reasons exist to apply a more deferential standard of review to congressional judgments to resort to affirmative action.

First, as the Court noted in *Croson*, Congress is vested with unique powers and responsibilities to enforce the Equal Protection Clause of the Fourteenth Amendment.[29] Where, as here, Congress makes a judgment that the attainment of the goals of the Equal Protection Clause can best be achieved through the adoption of an affirmative action plan, proper respect for the constitutional structure requires a significant level of deference to Congress. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974).

Second, as Justice Scalia noted in his concurrence in *Croson*, the smaller the local governmental unit, the greater the danger of "capture" by a transient majority bent on unfair treatment of the local minority. Thus, whatever the wisdom of deploying strict scrutiny at the local level as a prophylactic check against majoritarian overreaching, no basis exists to deploy it at the national level when Congress seeks to benefit minorities. When affirmative action plans are at issue, the very size and complexity of our pluralistic society at the national level provides the needed institutional check against unfair

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[29] Although the Fifth Amendment, which controls the constitutionality of an Act of Congress, does not contain an explicit equal protection clause, this Court has ruled that the due process language of the Fifth Amendment subsumes the equal protection language of the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

use of affirmative action by Congress. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)(representation of state interests in Congress permits Eleventh Amendment override by congressional action).

Finally, in *Croson*, the local legislative body that made the decision to invoke a minority set-aside program was controlled at the time by one of the groups the plan was designed to benefit. Where a local majority elects to benefit itself at the expense of members of another race, this Court apparently concluded in *Croson* that traditional *Carolene Products* analysis calls for strict judicial scrutiny of the decision. *See* J. Ely, *Democracy and Distrust* (1980).[30] Where, however, a legislative body elects to benefit radically underrepresented groups at the expense of the political majority, as in *Fullilove* or *Morton v. Mancari*, there is no equivalent basis for judicial suspicion of that legislative decision.

(3) Both Plans Under Review Advance A Compelling State Interest, Are Narrowly Tailored And Do Not Unfairly Affect The Interests Of Third Persons

Whatever level of scrutiny is applied, the affirmative action policies now under review pass constitutional

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[30] The suggestion in *Croson* that strict scrutiny is required whenever a local legislative body acts to benefit the racial group that controls the legislature appears to overstate the power of local legislatures. When, as in *Croson*, the state legislature, the Congress, and the surrounding economic community are all overwhelmingly white, *amici* do not believe that strict scrutiny is necessary.

In any event, strict scrutiny should not be applied to the gender based preference at issue in *Metro Broadcasting* since this Court has consistently declined to apply strict scrutiny to test the validity of gender based classifications. It would be fundamentally unfair to refuse to apply strict scrutiny to gender based classifications that harm women, but to insist upon strict scrutiny of classifications designed to assist them.

muster. Specifically, the FCC's affirmative action policies can and should be upheld as narrowly tailored efforts at advancing a compelling governmental interest.

As *amici* has noted, the compelling governmental interest is the attempt to assure that no significant segment of American society is left voiceless in the broadcast spectrum. Given the virtual absence of broadcast licenses owned or controlled by women or minorities,[31] Congress had an adequate factual predicate for its fear that the existing distribution of broadcast licenses threatened the integrity of the free market in ideas. Just as Congress is justified in fearing the exclusion of geographical voices from the spectrum, so it is justified in fearing the social consequences of the absence of voices controlled by women and minorities. Precisely such a "structural" interest in enhancing diversity of viewpoint was deemed compelling in *Bakke*; was found sufficient to justify affirmative action plans in *United Jewish Organizations* and *Morton v. Mancari*; and underlay the Court's reasoning in *Taylor v. Louisiana*. Thus, unlike *Croson*, a factual predicate for the use of affirmative action by the FCC was clearly established by Congress, whatever the standard of review.

(a) The Narrowly Tailored Nature Of The Use Of Race Or Gender As A "Plus" Factor In Comparative Licensing Proceedings

The use of race or sex as a "plus" in a comparative licensing proceeding imposes virtually no loss on third persons. Since the preference can be dispositive only when the contending applicants are substantially equivalent by other measures, the preference merely operates, in effect, to deny third persons the "right" to a random breaking of a tie. Where Congress has determined that the free market in ideas would be strengthened by encouraging otherwise absent voices on the broadcast spectrum, the use of race or sex to break a tie between equivalent broadcast candidates should not pose a close call.[32] Indeed, it is precisely the technique that was upheld in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

(b) The Narrowly Tailored Nature Of The "Distress Sale" Policy

Given the exceptionally narrow reach of the comparative licensing policy, it has been impossible to mount a convincing argument that it sweeps too broadly and unnecessarily "trammels" the interests of third persons. On the other hand, Judges Silberman and MacKinnon deemed the "distress sale" policy unduly broad because they perceived it as an absolute bar to the participation of nonminority bidders in the distress sale process and thus analogous to the fixed racial quota struck down in *Bakke*.[33] That view overstates the impact of the distress sale policy on third persons in several important ways.

First, unlike the layoffs in *Wygant* or the seniority rules in *Stotts* and *Teamsters*, the distress sale policy does not oust a third person from a settled status or act to

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[31] When the FCC initially adopted its affirmative action policy, fewer than 1% of broadcast licenses were owned or controlled by members of racial minorities. *FCC Statement of Policy on Minority Ownership of Broadcasting Facilities* (1978). *See* n.22, *supra*.

[32] This is not a case where race or sex is given so much weight in a comparative proceeding that it outweighs a clear advantage in traditional qualifications possessed by a third person. Even in such settings, moreover, this Court has held that affirmative action plans would be valid. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). *A fortiori*, such plans are valid when the contending candidates are otherwise equally qualified.

[33] The distress sale affirmative action policy benefits members of racial minorities, but not women.

frustrate vested expectations. As such, its impact is far closer to the frustration that a third person suffers whenever an affirmative action hiring or promotion plan is established. It is certainly no greater than the frustration experienced by third persons in *Fullilove*, *Weber*, *Paradise*, or *Johnson*.

Moreover, the existence of an actual injury-in-fact cannot be assumed merely because the distress sale policy has been invoked. In *Bakke*, there was ample reason to believe that the 16% quota materially diminished the plaintiff's chances of gaining admission to medical school.[34] Under the FCC rules, however, no prospective licensee had access to a distress sale prior to the adoption of the affirmative action plan.[35] If that plan were struck down, all prospective licensees would presumably be remanded for a comparative licensing proceeding in which ties would be broken in favor of the minority broadcaster. Unless the record demonstrates that a nonminority applicant would have defeated the minority broadcaster in this comparative proceeding or, at the very least, was foreclosed from meaningful "competition" for the broadcast license, *Bakke*, 438 U.S. at 305, the distress sale provisions have not "caused" the nonminority broadcaster any discernible loss. *See e.g.*, *Carey v. Piphus*, 435 U.S. 247 (1978); *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977); *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).[36]

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[34] Bakke's scores made it highly likely that he would have been admitted to the Davis Medical School but for the minority admissions quota. 438 U.S. at 276-77.

[35] Distress sales were permitted to avoid bankruptcy or other similar emergency. The adoption of the affirmative action plan in no way affects the emergency distress sale proceeding which remains open to all bidders.

[36] Here, the record is silent on the relative qualifications of the com- (continued...)

Second, the distress sale policy has affected only a miniscule portion of the national market in broadcast licenses. According to the record, only 33 stations were transferred to minority owners via a distress sale during a seven year period in the 1980's. This total "represent[s] 0.28% of all broadcast stations in the United States, far below the 10% of annual public works appropriations directed to minority businesses in *Fullilove*." *Shurberg Broadcasting*, 876 F.2d at 950-51 (Wald, J., dissenting)(footnote omitted).

Finally, the decision below mischaracterizes the actual "disqualification" suffered by third persons under the current distress sale rules. Contrary to the suggestion of the lower court, nonminorities are not absolutely disqualified from economic participation in the distress sale process. They are eligible without restriction to participate in both limited and general partnerships in connection with a distress sale so long as the broadcasting entity is controlled by a racial minority.[37] Since the purpose of the distress sale is to increase minority-controlled voices, nonminorities are permitted -- indeed encouraged -- to participate economically in the "bargain

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[36] (...continued)
peting applicants in *Astroline Communications*. At most, therefore, the matter should be remanded to the FCC to permit Shurberg Broadcasting to show that it has suffered an injury-in-fact from the distress sale rules that would be redressed by a decision striking them down. Otherwise, there is a serious question of Article III standing under this Court's opinions. *See Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

[37] In 1982, the FCC extended eligibility for the program to limited partnerships in which the general partner was a member of a minority group and owned at least 20 percent of the purchasing entity. Under this policy, it remains possible for nonminorities to play extensive roles in the distress sale process. *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

sale" process as long as they cede control of the broadcaster to an otherwise radically underrepresented minority voice. In effect, the distress sale policy offers nonminorities a generous economic discount if they will help to finance a minority controlled broadcast voice, but denies them the windfall benefit if they insist upon adding yet another majority voice to the broadcast spectrum. Such a policy of economic incentive hardly resembles a violation of the anti-discrimination principle.

(c) Congress Should Not Be Required To Adopt Programmatic Controls As A Means Of Promoting Broadcast Diversity

Attempts to assure that divergent viewpoints are adequately present on the broadcast spectrum could conceivably take the form of substantive content regulation. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). However, government attempts at regulating media content are fraught with First Amendment pitfalls. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Moreover, even if substantive regulation were permissible, its desirability is, to say the least, questionable. Instead, Congress has opted for a structural attempt to assure the optimum functioning of the free market in ideas. Given the unquestioned factual predicate for Congress' action and the narrowly tailored nature of the FCC's affirmative action policies, no basis exists for judicially second guessing the considered judgment of Congress.

CONCLUSION

For the above stated reasons, the decision in *Metro Broadcasting, Inc. v. FCC*, No. 89-453, should be affirmed and the decision in *Astroline Communications Co. v. Shurberg Broadcasting*, No. 89-700, should be reversed.

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